

Clark, Adam

From: Wojtach - CDPHE, Dena <dena.wojtach@state.co.us>
Sent: Tuesday, August 4, 2015 8:53 AM
To: Clark, Adam
Cc: Sean Hackett - CDPHE; clay clarke; Chris Colclasure - CDPHE; Odendahl, Steve
Subject: Re: SSM SIP Call

Adam,
We would like to talk w/ you. Today 10-11 will not work for us. I'm still checking our folks' schedules, but do you have any availability this afternoon from 2-5 or tomorrow, 8/5 11-5?

Dena

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On Mon, Aug 3, 2015 at 6:10 PM, Clark, Adam <Clark.Adam@epa.gov> wrote:

Hi all – Steve and I would like to have a call tomorrow, and are both available between 10 and 11 am if any of you can make that work. Please let me know.

1) If Colorado simply addressed the issue of precluding federal courts from action, would that address the SIP Call?

I can't provide a yes or no answer because the language is important. For instance, the reason we're being insistent about calling it an "enforcement discretion provision" rather than an "affirmative defense provision" stems from our characterization of AD provisions in the final SIP call;

"The term affirmative defense provision means more specifically a state law provision in a SIP that specifies particular criteria or preconditions that, if met, would purport to preclude a court from imposing monetary penalties or other forms of relief for violations of SIP requirements in accordance with CAA section 113 or CAA section 304."

Because our suggested language says “The Division will exercise its enforcement discretion to not seek civil penalties,” rather than leaving the decision of whether or not to pursue penalties up to the Division, it has the rigidity of an affirmative defense. Wyoming’s SIP-approved enforcement discretion provision (WAQSR Chapter 1 section 5(b)(i)) states “the Division may elect not to pursue enforcement after considering...”

- 2) Are either of the suggestions for that approach, which Colorado provided to R8 approvable (and why/why not)?

The following paragraph is taken from our final SIP call;

The EPA agrees that states may elect to revise their existing deficient affirmative defense provisions to make them “enforcement discretion”-type provisions that apply only in the context of administrative enforcement by the state. Such revised provisions would need to be unequivocally clear that they do not provide an affirmative defense that sources can raise in a judicial enforcement context or against any party other than the state. Moreover, such provisions would have to make clear that the assertion of an affirmative defense by the source in a state administrative enforcement context has no bearing on the additional remedies that the EPA or other parties may seek for the same violation in federal administrative enforcement proceedings or judicial proceedings.

Your drafted suggestions are unclear about their application to the underlined contexts above. We (R8) also aren’t clear on how the AD would apply at the state level. Does it apply in an administrative appeal or does it only apply to the Division’s decision? The provisions should be more specific about the limited circumstances in which they apply.

- 3) Is the suggested revision discussion work practices included in a permit approvable (and why/why not)?

These provisions could be construed to be director’s discretion in that each allows the state to alter a SIP emission limit through a permit, so we (R8) don’t consider them approvable.

Thanks,

Adam Clark

Air Quality Planning Unit

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From: Wojtach - CDPHE, Dena [mailto:dena.wojtach@state.co.us]

Sent: Monday, August 03, 2015 11:17 AM

To: Clark, Adam

Cc: Sean Hackett - CDPHE; clay clarke; Chris Colclasure - CDPHE

Subject: Re: SSM SIP Call

Adam,

Thank you for your input. To confirm, you've not been able to connect w/ HQ, and these are R8's suggested edits. My main questions on which I need answers asap are: 1) If Colorado simply addressed the issue of precluding federal courts from action, would that address the SIP Call;

2) Are either of the suggestions for that approach, which Colorado provided to R8 approvable (and why/why not);

3) Is the suggested revision discussion work practices included in a permit approvable (and why/why not).

Based on the redlined document, I understand that it would be easier to approve if we replaced affirmative defense w/ enforcement discretion, but that doesn't answer my questions 1 or 2. Regarding question 3, the redline document seems to imply that you are ok w/ SIP language endorsing the ability to include work practices in permits.

Again, any clarity you can directly provide on my above questions would be greatly appreciated. We need to wrap up our proposal by the end of this week.

Thank you,

Dena

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On Mon, Aug 3, 2015 at 10:41 AM, Clark, Adam <Clark.Adam@epa.gov> wrote:

Hi guys,

I've attached a document with our preliminary suggested edits. I say preliminary because this document hasn't yet been reviewed by EPA at the national level. As you can imagine, our headquarters offices have been pretty tied up of late. Regardless, I wanted to get you something useful given your timeline. I'm in Monday through Wednesday if you'd like to discuss. Thanks.

Adam Clark

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From: Wojtach - CDPHE, Dena [mailto:dena.wojtach@state.co.us]

Sent: Thursday, July 30, 2015 6:27 PM

To: Clark, Adam

Cc: Sean Hackett - CDPHE; clay clarke; Chris Colclasure - CDPHE

Subject: Re: SSM SIP Call

Adam,

Thank you for taking the time to talk with us today and for all of your efforts to help Colorado respond to the SSM SIP Call. As a follow up to our call, I'm attaching draft language that we'd discussed. This language follows the same approach, revising current language to add a provision that addresses the issue of precluding the federal court from taking action. The intent is to clearly state that the federal court can/will decide ultimately to what extent, if any, it will consider Colorado's affirmative defense to civil penalties to excess emissions during startup, shutdown and malfunction events.

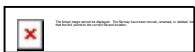
In addition, industry has requested consideration of an additional provision, for inclusion in either II.E. and II.J., or perhaps a new II.K. that is intended to leave the door open to individual sources pursuing work practice standards as alternative emission limitations as afforded via the permitting process.

Both revisions are included in the attached for your review. We welcome further discussions on this draft as well as the version sent to you on 7/29/15. I'll be in touch on Monday.

Thank you,

Dena

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On Wed, Jul 29, 2015 at 10:31 AM, Wojtach - CDPHE, Dena <dena.wojtach@state.co.us> wrote:

Adam,

Here is draft rule language incorporating WAC 173-400-109 into Colorado's affirmative defense provisions for SS and separately for M. This approach is still just one of several options being considered. We would greatly appreciate your input on this concept and draft language as soon as you can share it.

Thank you,

Dena

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On Mon, Jul 27, 2015 at 5:34 PM, Wojtach - CDPHE, Dena <dena.wojtach@state.co.us> wrote:

Adam,

Per our SSM SIP Call conversation today, Colorado continues to evaluate options in addressing the SIP Call. We remain open to several different options, including a slightly different approach from Washington Dept of Ecology ([Washington Admin Code 173-400-109](#)). In particular, we're looking at the following provision:

"The decision that excess emissions are unavoidable is made by the permitting authority, however, in a federal enforcement action filed under 42 U.S.C. § 7413 or 7604 the decision-making authority shall determine what weight, if any, to assign to the permitting authority's determination that an excess emissions event does or does not qualify as unavoidable under the criteria in subsections (3), (4), and (5) of this section."

We'd like to understand R8's perspective on this approach. Colorado is considering an option that would revise our current SIP language in II.E. and II.J. to include much of this language that clarifies that in federal enforcement actions the feds can determine if and to what degree they consider the state's criteria for granting an affirmative defense to civil penalties associated with excess emissions during SSM.

Let's plan to follow-up later this week (Thurs 10-1 or after 3) or early next week (Mon 10-12 or after 3). In the meantime, we will try to get you some draft language on this approach, and will look for your info on wk practice stds in NSPS/NESHAPs related to the wk practice std approach.

Thanks,

Dena

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